IN THE HIGH COURT OF BOMBAY AT GOA

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FIRST APPEAL NO. 99 OF 1999.

1. Life Insurance Corporation
of India having its
Divisional Office
at "Jeevan Vishwas"
EDC Complex, Patto,
Panaji, through its
Senior Divisional Manager.

2. Life Insurance Corporation
of India with its Branch
Office at Margao at
Kamat House, 2nd Floor,
Luis Miranda Road, Margao,
through its Branch Manager,
of Margao Branch. ... Appellants/
Orig.Defendants.

VERSUS

Smt. Maya alias Mahamaya
Mahableshwar Dessai,
major, widow,
residing at Islampur,
Baina, Vasco-da-Gama, Goa. ... Respondent/
Orig.Plaintiff.

Smt. S. Naik, Advocate for the Appellants.

Shri Sudin Usgaonkar, Advocate for the Respondent.

CORAM: N. A. BRITTO,

DATE OF RESERVING THE JUDGMENT: 28.04.2004.
DATE OF PRONOUNCING THE JUDGMENT: 6.05.2004.

J U D G M E N T:

The defendants in Special Civil Suit No.35/91 have filed the present appeal against the judgment/decree dated 10.6.98 of the learned Addl. Civil Judge, Senior Division (I), Margao.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said suit.

3. Some facts are required to be stated to dispose of the present appeal.

The plaintiff/respondent is the widow of her late husband Mahableshwar Desai. The said Mahableshwar Dessai had taken several policies from the defendants and the first three policies for Rs.5000/- each were taken commencing from 16.9.1970, 7.10.1971 and 27.12.1973. The next was for Rs.50,000/- commencing from 7.12.79. The other two were for Rs.1,00,000/- and Rs.90,000/- commencing from 1.3.1981. The last which is the subject matter of dispute was of Rs.2,00,000/- commencing from 8.1.1988. Except for the last policy, the defendants have paid the amount due on the previous policies presumably because the said policies could not be called in question by virtue of Section 45 of the Insurance Act, 1938. The said Mahableshwar got unwell on or about 14.3.1988 and was examined by Dr. Umanath Salelkar (P.W.2) and who found that as a case of emergency the said Mahableshwar had to be referred to Salgaoncar Research Centre where he was

examined by Dr. Pradip R. Pai (P.W.4) in unconscious condition. The said Mahableshwar died subsequently on 23.3.1988 and the cause of his death has been certified by the said Dr. Pradip Pai on medical certificate issued by him (Exh.PW.4/A) as Ischaemic Heart disease with left ventricular gastric and renal failure and Uraemia. As the said Mahableshwar had died during two years of obtaining the said policy for Rs.2,00,000 commencing from 8.1.88 the defendants conducted investigation into the death of the said deceased Mahableshwar and in the course of the said investigation obtained certificates from two Doctors namely certificate dated 26.11.88 from Dr. Dessai (D.W.2) and certificate dated 28.11.1988 from Dr. Deo (D.W.3) and based on the same the defendants repudiated the said policy. By letter dated 15.3.89 the defendants informed the plaintiff that her deceased husband had given false answers to certain questions and that the defendants had undisputable proof to show that about two years prior to the proposal for the said policy was accepted by the defendants, her deceased husband had suffered from renal colic, bronchitis and anal fissures for which her husband had consulted medical men and had taken treatment from them but had not disclosed those facts in his proposal form and instead had given false answers to

the said questions.

The said questions are as follows:-

Q.18: Have you suffered from or are you suffering from:

(a) persistent cough, asthma, bronchitis, pneumonia, pleurisy, spitting of blood, tuberculosis, or any other disease of lungs ?

Ans. No.

(b) Any disease of kidney, prostate or urinary system ?

Ans.: No.

Q.20: Have you consulted a medical practitioner, within the last five years for any ailment requiring treatment for more than a week ?

Ans.: No.

4. The case of the plaintiff is that upon the

receipt of the said letter the plaintiff made a representation by letter dated 12.9.1989 informing the defendant that her late husband was not suffering from any disease and requesting the defendants to review the case and settle the claim under the policy and the defendants informed the plaintiff that it was not possible to revise the decision taken by the defendants to repudiate the claim under the said policy. The plaintiff stated that at no point of time her deceased husband or at least two years before contracting the said policy had suffered any sickness or renal colic or bronchitis or anal fissures and that his death was due to cardiac arrest and that at no point of time the plaintiff's late husband had furnished false information or false answers to any of the questions regarding any such sickness at the time of effecting the assurance in violation of the terms of the policy and the declaration contained in the form of proposal for assurance. The plaintiff stated that she was entitled to receive the said sum of Rs.2,00,000 due under the said policy together with all the benefits under the said policy with interest at the rate of 21% per year from 23.3.88 till final payment.

5. Contesting the suit, the defendants admitted

that the plaintiff was the nominee under the said policy but she was not entitled to the money due under the said policy. The defendants stated that whenever a party applies to the defendants to issue a policy of assurance, of his/her life (called a proponent) a proponent is required to fill in a form called "proposal for insurance" to which is annexed separately medical examination report about the proponent's health, family history and various other matters are put to him/her and which have to be truly and correctly answered and in addition to the proponent is obliged of his/her own accord to spontaneously disclose any facts which may be material for the defendants as insurer to know and on the fate of such answers, disclosures and information, the defendants consider whether to enter on the risk and issue a policy or not and whether on the same terms and conditions as those in the proposal or other conditions and whether at the normal rate of premium or at higher premium. The defendants stated when the deceased applied for an assurance in the said sum of Rs.2,00,000 he was required to submit and submitted the said proposal and sub-joined to the proposal was a declaration in the following terms :-

" I, Mahableshwar Ramchandra Desai, the

person whose life is hereinabove proposed to be assured, do hereby declare that the foregoing statements and answers have been given by me after fully understanding the questions and the same are true and complete in every particular and that I have not withheld any information and I do hereby agree and declare that these statements and this declaration shall be the basis of the contract of assurance between me and Life Insurance Corporation of India and that if any untrue averment be contained therein the said contract shall be absolutely null and void and all moneys which shall have been paid in respect thereof shall stand forfeited to the Corporation. "

6. The defendants stated that by virtue of the said declaration, the answers of the deceased in the said proposal for assurance were turned into warranties which had to be absolutely correct and strictly complied with an any untrue answer would avoid the contract of assurance because Section 45 of the said Insurance Act does not apply to this case because the claim made under the policy having been repudiated by the defendants within 2 years from the date on which the policy was effected.

7. The defendant stated that acting on the fate

of the information given on the said proposal for insurance form, the defendants accepted the proposal and issued the said policy dated 5.5.98 on the life of the deceased with a preliminary recital that the proposal and declaration that the statements contained and referred to therein were to be the basis of the contract of assurance between the parties. The defendants stated that as a result of inquiries made by them after the death of the deceased it was ascertained that the deceased gave false and/or inaccurate answers to the questions put to him in respect of the said policy inter alia the information to the said questions No.18 and 20 which amounted to fraud and breach of the terms and conditions of the proposal form, letter of acceptance and policy. The defendants stated that the deceased prior to the date of proposal for assurance was suffering from bronchitis, renal colic and anal fissures for which he had taken medical treatment and the deceased did not disclose these ailments in the said proposal for assurance and deliberately suppressed the same from the defendants although he was aware of the said ailments and the medical treatment take for the same but deliberately withheld the same information from them and made no mention in the proposal form which in law he was bound to do. The defendants stated that knowingly

and fraudulently the deceased suppressed facts and made false and inaccurate statements and withheld correct information from the defendants regarding ailments and medical treatment taken for the same at the time of effecting the said insurance, and that in terms of the said declaration, conditions laid down in the proposal for assurance, letter of acceptance - first premium receipt, policy and in law the contract of assurance had become null and void and all claims and benefits therein have ceased and determined and therefore the defendants are under no obligation or liability to make any payment whatsoever to the plaintiff towards the said policy and all monies that have been paid by the deceased by way of premium stood forfeited. The defendants stated that in case the deceased had disclosed the said facts about his ailments in the proposal form then he would have been subjected to further medical examination and investigation and on the basis of medical reports, the defendants would then have decided whether to accept the proposal for assurance, reject or refuse the same at higher rates. The defendants submitted that withholding the above information amounted to fraud thereby entitling the defendants to avoid the policy because it was obtained by fraud and the plaintiff cannot get benefit of the said fraud committed by the

deceased and therefore the plaintiff was not entitled to the amount due under the said policy with bonus and interest thereon as alleged and the defendants have therefore rightly repudiated their liability under the said policy by its letter dated 15.3.89.

8. During the trial of the suit, the plaintiff examined her attorney who stated that the deceased Mahableshwar did not have any disease about two years prior to the policy and he went to the extent of stating that deceased also did not have any disease for the period of two years after the said policy, forgetting the fact that the deceased had died within three months after obtaining the said policy. The plaintiff also examined Dr. Salelkar (P.W.2) who stated that the said Mahableshwar was his patient from 1970 and according to him the said Mahableshwar had not suffered from any renal colic or bronchitis or anal fissures. He also stated that the said Mahableshwar did not have any major attack about three years prior to his death. However, he did not state whether the deceased Mahableshwar had any minor attack, and if so, when. He stated that the cause of death of the said Mahableshwar was cardiac arrest. The plaintiff examined Shri Dessai, the defendants' agent through whom the plaintiff had

obtained all the said policies and he stated that at the time of the last policy the health of the said Mahableshwar was very good. The plaintiff examined Dr. Pradip Pai (P.W.4) who had admitted the deceased Mahableshwar on 14.3.88 in unconscious state in Salgaoncar Medical Research Centre and treated him until his death on 23.3.1988. The defendant examined its Manager Shridar (DW.1) who stated that the deceased had given incorrect answers to the questions No.18 and 20 and who further stated that the because of non-disclosure of material facts the contract had become null and void.

9. The learned trial Court after considering the evidence of Dr. Dessai (DW.2) and Dr. Deo (DW.3) came to the conclusion that there was no evidence to show that the late Mahableshwar knew that he was suffering from renal colic and therefore it could not be said that the deceased Mahableshwar had given incorrect information in the proposal form knowing that his reply was not correct. The learned trial Court also came to the conclusion that the defendants had failed to discharge their burden that the deceased had given incorrect information and the learned trial Court further came to the conclusion that the cause of death had no direct nexus with the ailment in respect of which false answers were given

and therefore decreed the suit of the plaintiff.

10. Learned Advocate Smt. Naik, on behalf of the defendants, has submitted that it was not necessary that there should be any connection between the false information given by the deceased and his subsequent cause of death. Smt. Naik submitted that in the case at hand the deceased concealed relevant facts and that non-disclosure of facts has not at all been touched by the learned Trial Court. Smt. Naik placed reliance on the cases of **P. Sarojam v. L.I.C. of India** (A.I.R. 1986 Kerala, 201) and **Mithoolal Nayak v. Life Insurance Corporation of India** (A.I.R. 1962 S.C., 814) on which reliance was also placed on behalf of the defendants before the learned trial Court.

11. On the other hand, it has been submitted by learned Advocate Shri Usgaonkar, on behalf of Plaintiff, that in the case of the said **Mithoolal Nayak** (supra) what was suppressed was information relating to a major disease or major ailment. Shri Usgaonkar has further submitted that the defendants did not examine in this case Dr. Carmo Gracias who had examined the deceased Mahableshwar before issuing the said policy and that there has been no close relation between the information alleged to be

withheld by the deceased and the disease resulting in his subsequent death. Shri Usgaonkar has submitted that if at all the deceased Mahableshwar was suffering from the ailments which have been deposed to by Dr. Desai (DW.2) and Dr. Deo (D.W.3), the same were routine ailments and that the trial court has justifiably disbelieved both the said doctors. It is the submission of learned Advocate Shri Usgaonkar that before any contract is repudiated the information withheld has got to be material information touching the said contract. Shri Usgaonkar has submitted that in the case at hand there has not been deliberate or wilful suppression of facts. Reliance has been placed by Shri Usgaonkar on the case of **Smt. Dipashri v. Life Insurance Corporation of India and others** (A.I.R. 1985 Bombay, 192).

12. How did the deceased die ?

As stated by DW.1 Shridhar, they found that the cause of death of the deceased Mahableshwar was ischaemic heart disease with left ventricular failure, with renal failure with uraemia. This statement of DW.1 Shridhar is in conformity with the medical certificate produced by the plaintiff herself and issued by plaintiff's own witness P.W.4

Dr. Pai Therefore, it would not be correct for either of the parties to say that the deceased Mahableshwar had died merely of a heart attack. He died due to causes stated in certificate – Exh.PW.4/A including renal failure. There can be no dispute that the burden of proof that the insured Mahableshwar was guilty of making false representations or had suppressed material facts was upon the defendants. It is not in dispute and it cannot be disputed as well, that all information that is not given will matter but false information on material facts alone which will matter and would be sufficient to repudiate a contract of insurance. In this context reference could be made to the case of **Life Insurance Corporation of India v. Smt. G.M. Channabasemma** (A.I.R. 1991 S.C., 392) wherein the Hon'ble Supreme Court has stated that it is well settled that a contract of insurance is contract uberrima fides and there must be complete good faith on the part of the assured. The assured is thus under a solemn obligation to make full disclosure of material facts which may be relevant for the insurer to take into account while deciding whether the proposal should be accepted or not. While making a disclosure of the relevant facts, the duty of the insured to state them correctly cannot be diluted (emphasis supplied).

13. In the case of **Life Insurance Corporation of India and others v. Smt. Asha Goel and another** (A.I.R. 2001 S.C., 549) the Supreme Court has dealt with the scope of repudiation of claim of the insured or nominee by the Corporation and has stated that the provisions of Section 45 of the Insurance Act are of relevance in the matter. The Hon'ble Supreme Court has observed that on a fair reading of the section, it is clear that it is restrictive in nature. It lays down three conditions for applicability of the second part of the Section namely :- (a) The statement must be on a material matter or must suppress facts which it was material to disclose; (b) the suppression must be fraudulently made by the policy holder; and (c) the policy holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose. Mere inaccuracy of falsity in respect of some recitals or items in the proposal is not sufficient. The Supreme Court again reiterated in this case the principle that the burden of proof is on the insurer to establish these circumstances and unless the insurer is able to do so there is no question of the policy being avoided on ground of mis-statement of facts. The contracts of insurance including the contract of life assurance are contracts uberrima

fides and every fact of material must be disclosed. Otherwise, there is good ground for rescission of the contract. The duty to disclose material facts continues right up to the conclusion of the contract and also implies any material alteration in the character of the risk which may take place between the proposal and its acceptance. If there are any mis-statements or suppression of material facts, the policy can be called in question. For determination of the question whether there has been suppression of any material facts it may be necessary to also examine whether the suppression relates to a fact which is in the exclusive knowledge of the person intending to take the policy and it could not be ascertained by reasonable enquiry by a prudent person. The Hon'ble Supreme Court referred to the said case of **Mithoolal Nayak** (supra) wherein the position of law was stated thus :-

> " The three conditions for the application of the second part of S.45 are
>
> (a) the statement must be on a material matter or must suppress facts which it was material to disclose,
>
> (b) the suppression must be fraudulently made by the policy holder and
>
> (c) the policy holder

> must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose. "

14. In order to discharge the burden that the deceased Mahableshwar had given false information on material and relevant facts, the defendants examined DW.2 Dr. Dessai and DW.3 Dr. Deo.

15. It is necessary to refer to the evidence given by the said two Doctors in a little greater detail.

DW.2 Dr. Dessai stated that he knew the deceased Mahableshwar R. Dessai who was receiving treatment from him for anal fissures and bronchitis and he was with him for treatment for hardly 5 to 7 days. He stated that the ailments which the said Mahableshwar was suffering from were not of serious nature and were routine ailments. In cross-examination DW.2 Dr. Dessai admitted that he was a panel doctor for the defendants and further stated that in normal course the said ailments would require 5 to 7 days for total cure. He denied the suggestion that the deceased Mahableshwar had not taken any treatment from him at any time. He further denied the suggestions that he had deposed falsely because he was a panel doctor of the defendants. The evidence of DW.2 Dr. Dessai could

be brushed aside with some hesitation. His evidence was relevant to answer given to question No.18(a) of the proposal form filled by the deceased Mahableshwar. However, it is to be noted that DW.2 Dr. Dessai did not at all say anything as to when deceased Mahableshwar had visited him and moreover it had also to be seen that DW.2 Dr. Dessai was a panel doctor of the defendants. The evidence of DW.2 Dr. Dessai therefore could not be said to be of much relevance to the case of the defendants considering that no date or period of treatment was mentioned by Dr. Dessai. However, the same thing could not be said of DW.3 Dr. Deo. Dr. Deo stated that the deceased Mahableshwar was his patient and was suffering from kidney stones, known in medical terms as renal calculi. Dr. Deo stated that the deceased had taken treatment from him for about 6 to 8 months from 7.12.86 to 9.4.87. He further stated that Mahableshwar had acute pain in the abdominal region. He further stated in cross-examination he had carried out test for urine observation which showed obsolory crystals. He admitted that he had not done any sonography. He had further stated Mahableshwar had recovered completely and that he was not a panel doctor of L.I.C.

The evidence of DW.3 Dr. Deo shows that the

deceased Mahableshwar had taken treatment from him for nearly 4/5 months from 7.12.86 to 9.4.1987 almost a year prior to his death and although Dr. Deo stated that Mahableshwar had recovered completely, it is common knowledge that the persons who suffer from kidney stones have tendency of recurrence of the said stones even if at times they are treated or the stones are discharged from the urinary tract. The learned trial Court has simply brushed aside the evidence of Dr. Deo and has concluded that there was no evidence to show that late Mahableshwar knew that he was suffering from renal colic. If the deceased suffered acute abdominal pain and took treatment from a doctor for a period of 4/5 months it could not be said that he had given correct information when the deceased answered questions No.18(b) and 20 of the said proposal form. The learned Trial Court was absolutely wrong in observing that it was difficult to hold that the late Mahableshwar knew that he was suffering from renal colic. The said Mahableshwar, who had taken treatment from Dr. Deo for renal calculii certainly ought to have known tht he was suffering a disease of kidney and/or of urinary system as stated in Question 18(b) of the proposal form and ought to have disclosed this material information to the Corporation so that they were

free to decide whether the proposal was to be accepted or higher premium was to be demanded. In other words, the deceased was certainly guilty of submitting his said proposal with relevant and material information which was false and he very well knew was not true. It cannot be said in this case that the cause of death is not related to the information given in the negative by deceased Mahableshwar with reference to question No.18(b). The defendants had established through the evidence of DW.3 Dr. Deo that the deceased was suffering from kidney stones regarding which the deceased had given false information in answer to the said question No.18(b) and not only that, the deceased had ultimately died also on account of ischaemic heart disease associated with renal failure. I am inclined to believe that it is the renal failure in a person who was suffering from renal calculii that eventually resulted in heart failure and consequent death of the deceased. The plaintiff therefore cannot now be heard to say that the cause of death of the deceased had nothing to do with the incorrect and false information given by the deceased in answer to question No.18(b) or for that matter question no.20 of the said proposal form. Although Dr. Deo (DW.3) as a Homeopath stated that the said ailment was not a serious one, it appears that the

said ailment did contribute to the death of the deceased as certified by PW.4 Dr. Pai. In my opinion, the deceased Mahableshwar was certainly guilty of giving incorrect and false information in respect of material aspects of his health or the disease he was suffering from and the period from which he was suffering and which ultimately resulted in his death, and therefore the defendants were justified in repudiating the policy because the deceased was suffering from kidney stones regarding which the deceased suppressed information in the said proposal form.

16. Reverting to the case of **Smt. Dipashri v. Life Insurance Corporation of India and others** (A.I.R. 1985 Bombay, 192) it may be stated that in the proposal form the deceased policy holder had stated that the usual state of his health was good, that he had not consulted a Medical Practitioner within the last five years prior to the date of making the proposal and that he had not remained absent from work on ground of health during previous two years. The certificate issued by the employer of the deceased set out in detail, the ailments viz. influenza, dysentery, bleeding piles and fever suffered by the deceased before taking the policy and the sick leave secured by him from his office on production of medical certificate. The Life

Insurance Corporation relying on the said certificate claimed that the statements made by the deceased in the proposal form were fraudulent suppression of material facts. The deceased in that case had died while lighting a stove in the kitchen accidentally after sustaining severe burns. In that background this Court observed that assuming the certificate issued by the employer was correct and the deceased had in fact secured sick leave on the relevant dates by production of medical certificate, it could not be concluded that the deceased was in fact suffering from bleeding piles or hypertension and that the ailment of bleeding piles, influenza and dysentery are very minor and trivial ailments and the failure to disclose such ailments in the proposal form could not be treated as suppression of the relevant particulars and the deceased might have very well felt that it was not necessary to state that he had suffered from flu, dysentery or common cold because such ailments have no bearing whatsoever to the longevity of the person. This Court also held that there was no suppression whatsoever by the deceased in that case because it was not necessary for the deceased to disclose trivial ailments like fever, flu or dysentery. This Court further observed that on perusal of the proposal form left no manner of doubt that it is not

each and every petty ailment which has to be disclosed in the proposal form and what is required to be disclosed is a serious ailment and the deceased in that case was not suffering from any serious ailment and was a young man of 41 years of age while taking out the policy.

17. In the case of **P. Sarojam v. L.I.C. of India** (supra) a Bench of the Kerala High Court observed that the insured had taken a policy on 20.9.1973 and had died on 2.4.1974 of a heart attack. At the time of filling the proposal form, as against the question as to whether he had at any time suffered disease of the heart, answer given by him was in the negative and the Corporation was able to prove in that case that the proposer was suffering from a serious heart ailment, and in that context the Bench observed that a contract of insurance is uberrima fides and the person seeking insurance is in duty bound to disclose all material facts relating to the risk involved in the policy of insurance. Referring to H.R. Hardy Ivamy in his General Principles of Insurance Law at page 133, the Bench observed that " The duty of making disclosure is not confined to such facts as are within the actual knowledge of the assured and it extends to all material facts which he ought in the ordinary

course of business to have known, and he cannot escape the consequences of not disclosing them on the ground that he did not know them. ". The Kerala High Court therefore came to the conclusion that the false answers to the questions in the proposal form given by the insurer relating to his health contract of insurance and the Corporation was entitled to repudiate the policy and decline payment thereunder.

18. As already stated the deceased Mahableshwar was suffering from kidney stones and was being treated for a period of 4/5 months by DW.3 Dr. Deo. The deceased eventually came to die due to renal failure and consequent heart failure. The ailment the deceased was suffering from cannot be treated as minor ailment because it eventually contributed to his death. The fact that the deceased was suffering from kidney stones was a fact which was to the exclusive knowledge of the deceased, and this fact would not have been known by ordinary prudence by Dr. Gracias who might have examined him on behalf of Corporation prior to the issue of policy. The non-disclosure of this fact was a fradulent suppression of relevant and material information by the deceased. On account of the said non-disclosure or suppression of material information regarding the

health of the deceased, the defendants were certainly entitled to repudiate the policy in the manner done by them. In such a situation, the Judgment and Decree of the learned Addl. Civil Judge Senior Division, is bound to be disturbed and set aside.

19. Consequently, the appeal deserves to succeed. The suit filed by the plaintiff is hereby dismissed. No order as to costs.

N.A. BRITTO, J.

sl.